(1) 2-3-98

No. 97-1273

In The

Supreme Court of the United States

October Term 1997

LESTER J. MILLET, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a Hobbs Act prosecution charging extortion of a private individual under color of official right be sustained on an uncharged jurisdictional interstate commerce effect on a third party that is not the alleged extortion victim?

2. Can a Hobbs Act prosecution charging extortion of a private individual under color of official right be constitutionally sustained when the jurisdictional interstate commerce effect is alleged to be the activities of a corporate entity not charged as, nor related to, the extortion victim?

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PETITION FOR WRIT OF CERTIORARI

Lester J. Millet, Jr. ("Millet") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on September 15, 1997, in order to correct a decision that is contrary to the statutory construction principles set forth in the decision of this Court in *Stirone v. United States*, 361 U.S. 212 (1960).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is reported at 123 F.3d 268 (5th Cir. (La.) 1997). It is reprinted in Appendix A hereto ("App. A") at page App-1. By order filed November 5, 1997, the Fifth Circuit denied Millet's petition for rehearing and suggestion for rehearing *en banc*. App. A, at page App-25.

JURISDICTION

On April 24, 1996, following trial of this matter in the United States District Court for the Eastern District of Louisiana, a jury returned a verdict of guilty on all counts. Millet timely sought an appeal of that verdict. The Court of Appeals for the Fifth Circuit affirmed the jury's verdict on September 15, 1997. On November 5, 1997, the court denied Millet's petition for rehearing and suggestion for rehearing *en banc*. Pursuant to Supreme

Court Rule 13.3, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED IN THIS CASE

Title 18, United States Code:

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspires so to do . . . shall be fined under this title or imprisoned not more than twenty years or both.

(b) As used in this section –

. . . .

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means . . . all commerce between any point in a State, Territory, Possession, or the District of Columbia, and any point outside thereof. . . .

United States Constitution:

The Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

> or indictment of a Grand Jury . . . [n]or be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . .

STATEMENT OF THE CASE

The United States charged Lester Millet in a three-count indictment with a violation of the Hobbs Act [18 U.S.C. § 1951(a)], money laundering [18 U.S.C. § 1956], and the Travel Act [18 U.S.C. § 1952]. The specific Hobbs Act count alleged that Millet extorted approximately $200,000.00 not due to him or to his office from Durel Matherne, an individual, with Matherne's consent and under color of official right. The $200,000.00 was alleged to have come from a single real estate commission earned by Matherne from the sale of the Whitney Plantation in St. John the Baptist Parish, Louisiana, which sale had no interstate implications.

The district court instructed the jury that the government had charged Millet with extorting money from Matherne in return for Millet's acts performed and/or promised as a parish official. Nevertheless, with respect to the jurisdictional interstate commerce aspect of the Hobbs Act, the court instructed the jury that it could also consider whether Millet's action had interfered with or

affected interstate commerce by adversely affecting the interstate and international commercial activities of Formosa Plastics Corporation ("Formosa"). Prior to the charged extortion by Millet of Matherne, Formosa had purchased the Whitney Plantation for a possible plant site. Matherne had acted as agent for the sellers in that transaction, who had paid the sales commission that was owed. The indictment alleged only a single action of extortion of Matherne by Millet; it did not allege that Millet had extorted Formosa or any individual or entity other than Durel Matherne.

> Paragraph 18 of the indictment set forth the specific charge of extortion:
>
> "18. From on or about January 11, 1988, and continuing until or about January 13, 1992, in the Eastern District of Louisiana and elsewhere, LESTER J. MILLET, JR., while serving as Parish President for St. John the Baptist Parish, Louisiana, did knowingly, willfully and unlawfully, affect and attempt to affect interstate commerce by means of extortion, **in that the defendant did unlawfully obtain approximately $200,000 not due him or his office from Durel Matherne, with Durel Matherne's consent, under color of official right**, that is, for or because of official acts by LESTER J. MILLET, JR. related to the sale of the Whitney Plantation." (Record Excerpts, page 26). (Emphasis added).

Concerning the extortion, the district court charged the jury as follows:

> "In this case, the government argues that the defendant extorted money from Durel Matherne by requiring that Matherne purchase 1/2 of the property which has been referred to at trial as

> the 'Highway 51 property' for $200,000 in return for official acts promised or performed by the defendant." (Record Excerpts, page 50).

Concerning the jurisdictional interstate commerce aspect, however, the Court charged the jury as follows:

> "Under this theory the defendant may have interfered with or affected commerce in any one or all of the following ways: 1) depleting the assets of an *individual* customarily and directly engaged in interstate commerce; 2) causing or creating the likelihood that *Durel Matherne* would deplete the assets of a business or businesses engaged in interstate commerce; 3) extorting such a large amount that it had a cumulative effect on interstate commerce; or 4) *adversely affecting the interstate and international commercial activities of Formosa Plastics Corporation, a company headquartered in Taipei, Taiwan, Republic of China.* (Record Excerpts, pages 50–51). (Emphasis added).

The jury returned a conviction on all counts,[1] which conviction was affirmed on appeal. The Fifth Circuit held that the Millet indictment was drawn in general terms that tracked the statute, rather than in specific terms directed toward Durel Matherne. Consequently, reasoned the court, the prosecution was not limited in proving the

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[1] The Hobbs Act allegation in Count 1 was the underlying criminal activity charged in the money laundering charge in Count 2. The Hobbs Act allegation in Count 1 was also the illegal activity forming the predicate for the Travel Act violation in Count 3. Thus, whether the jury was permitted to render a guilty verdict upon an impermissible premise underlies Millet's conviction on all counts.

effect on interstate commerce only to the effect on Durel Matherne, the individual actually named as the victim in the indictment. Instead, the prosecution could offer evidence of an effect on interstate commerce that was both indirect and attenuated from the charged extortion. Millet sought and received a request for an extension of time within which to file both a petition for rehearing and a suggestion for rehearing *en banc*. Both the petition for rehearing and suggestion for rehearing *en banc* were subsequently denied. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's *Millet* Opinion Permits Conviction Under The Hobbs Act on an Uncharged Attenuated Effect on Interstate Commerce, Thus Expanding the Breadth of Hobbs Act Prosecutions in a Manner That Is Neither Permitted By Statute Nor Consistent With This Court's *Stirone v. United States*, 361 U.S. 212 (1960), or The Fifth Circuit's Own *United States v. Collins*, 40 F.3d 95 (5th Cir. (Tex.) 1994).

This case squarely raises the issue of whether prosecutions brought under the Hobbs Act can satisfy the Act's jurisdictional requirement through attenuated and uncharged activities. Hobbs Act jurisdiction requires that the prohibited activities have an effect on interstate commerce. In *Collins v. United States*, the Fifth Circuit interpreted the "effect on interstate commerce" in an indictment charging a Hobbs Act violation directed to an individual as being limited to the interstate implications of the *individual* allegedly extorted. *Collins*, 40 F.3d at 99. The indictment against Millet charged that Millet had

extorted Durel Matherne, an individual, and that the subject of the extortion was Millet's demand for a share of Matherne's Whitney Plantation real estate commission. The commission at issue had resulted from the sale by the Barnes family of a Louisiana plantation in St. John the Baptist Parish. The only connection to the Formosa Plastics Corporation is that Formosa happened to purchase the property.

In proposing jury charges during trial, however, the government argued that the jury might also consider the effect on interstate commerce of an additional *but uncharged* activity, namely, the proposed building of a rayon plant by Formosa on the St. John the Baptist Parish property it had purchased. The district court agreed with the prosecution and allowed the addition to the jury charge. As a result, the jury was presented with an uncharged "effect-on-interstate-commerce" aspect under which it might convict Millet. That additional uncharged aspect was whether the charged extortion by Millet of Matherne had an effect on the interstate business of the corporation that had bought the property from which the commission at issue had been earned and paid by the sellers. It is this aspect of the trial and of the charge that led to a constructive amendment of the indictment against Millet, in direct contravention of this Court's *Stirone* decision[2] and in violation of Millet's constitutional rights.

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[2] "The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened, a conviction must rest on that charge and not another. . . . " *Stirone*, 361 U.S. at 218.

Stirone directly dealt with a Hobbs Act extortion charge that alleged a specific extortionate act. That indictment charged that Stirone had extorted an individual whose plant transported sand in interstate commerce. At trial, however, the government employed a "House That Jack Built" scenario to provide the requisite jurisdiction under the Act. It did so by claiming that Stirone had (1) performed an extortionate act (2) against an individual (3) who owned a company engaged in the transportation of sand, (4) that the act affected the movement of sand, (5) which was used in the concrete (6) that built the plant (7) that made the steel, (8) which was sent into commerce, and (9) whose interstate movement was thus affected. Although the only extortionate act charged against Stirone was related to the movement of sand in interstate commerce, the movement of steel in interstate commerce was also included with the submission to the jury as an additional, but uncharged, interstate commerce aspect. This Court granted certiorari and held that such an inclusion was not permissible under the Hobbs Act when an indictment charged a specific extortionate act – in this case, affecting sand, not steel. The inclusion of steel thus resulted in an impermissible constructive amendment to the indictment. *Stirone*, 361 U.S. at 219.

Like that against Stirone, the prosecution against Millet predicated federal jurisdiction upon another "House That Jack Built" scenario. The indictment charged that the single extortionate act was directed toward one real estate commission of an individual, Durel Matherne. Millet was charged with (1) affecting and attempting to affect interstate commerce (2) by means of extortion, (3) in that the defendant did unlawfully obtain approximately

$200,000 not due him or his office from Durel Matherne, with Durel Matherne's consent, under color of official right, (4) that is, for or because of official acts by Lester J. Millet, Jr. (5) related to the sale of the Whitney Plantation. As in *Stirone*, the prosecution went beyond the scope of its indictment against Millet by claiming at trial that Millet affected interstate commerce by (1) pressuring Matherne (2) to buy the Highway 51 Property (3) so that Millet could gain a share of the real estate commission Matherne earned (4) from the sale of the Whitney Plantation by the Barnes Family to Formosa as a possible site for a rayon plant, assuming zoning and environmental requirements could be met, (5) that Formosa became aware of the rumored extortion and (6) canceled its plant, (7) thereby affecting the interstate commerce of Formosa. No interstate implications regarding the purchase and sale of the Whitney Plantation were proved at trial. However, the jury was permitted to consider whether Millet's alleged extortion of Matherne affected the decision of Formosa (two years *after the sale*) not to build a rayon plant in St. John the Baptist Parish. This "House That Jack Built" bootstrap-upon-bootstrap scenario is analogous to the situation that this Court held impermissible in *Stirone*. Other circuits, most recently the Eight Circuit in *United States v. Quigley*, 53 F.3d 909 (8th Cir. (Neb.) 1995), have similarly rejected the prosecution's attempt to create an interstate commerce nexus between a robbery of two individual who were going to a store to buy beer (a commodity traveling in interstate commerce) with the failure of their ability to do so as a result of the robbery.

Such an attenuated nexus should be impermissible here as well.[3]

If not, the Fifth Circuit's *Millet* opinion will allow prosecutors unlimited latitude in establishing the federal jurisdictional "effect-on-interstate-commerce" requirement when they have the good fortune to be proceeding

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[3] Other circuits have likewise rejected similar attempts to secure federal jurisdiction through such attenuated connections, especially those in which the alleged victims responded to the alleged extortions, as did Durel Matherne, through use of personal, rather than business, assets. In *United States v. Buffey*, 899 F.2d 1402 (4th Cir. (W.Va.) 1990), the Fourth Circuit reversed a Hobbs Act extortion conspiracy conviction that had predicated jurisdiction upon attempted extortion of a very wealthy businessman. It was conceded at trial that the businessman was highly unlikely to have used business assets to pay any demand and that any depletion of his personal fortune was likely to be *de minimis*.

Similarly, in *United States v. Mattson*, 671 F.2d 1020 (7th Cir. (Ill.) 1982), the Seventh Circuit reversed a Hobbs Act extortion conviction that had predicated jurisdiction upon a depletion-of-assets nexus of the extortion to a single business entity. As in the subsequent cases of *Buffey* and the Fifth Circuit's *Collins*, the *Mattson* court ruled that the jurisdictional reach of the Hobbs Act does not extend to create a nexus between an individual's use of his own private funds and the requisite effect on interstate commerce.

This Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), emphasized this long line of authority, including *Stirone*, holding that the jurisdictional elements of a statute must be taken seriously. Evidence must be presented that demonstrates an "explicit connection with or effect on interstate commerce." These statutory provisions en force the limitations on Congress' powers to those set forth in the Constitution and keep intact the division of authority between the federal government and the states.

under a Hobbs Act indictment that charges extortion of one individual by another through a specific act. The limiting effect of this Court's *Stirone* decision is that Hobbs Act indictments, when the interstate commerce aspect is defined (as it was in *Millet)*, cannot be expanded at trial or by jury instruction beyond the original parameters of the indictment. Despite this well-established precedent, the Fifth Circuit's opinion allows the prosecution to seek a Hobbs Act indictment on one basis and convict on another. As a result, the Act's federal jurisdictional basis becomes subject to constructive amendment during trial and by jury charge. The *Millet* decision thus materially alters an interpretation of this Court in effect since 1960 and extends the reach of the Act as well.

Ironically, the Fifth Circuit itself, less than four years ago in *Collins*, addressed the interstate commerce aspect of the Hobbs Act when the unlawful activity charged is defined and directed to an individual:

> Given the fact that '[t]he Hobbs Act definition of commerce is coextensive with the constitutional definition,' and that the congressional commerce power extends only to conduct which 'exerts a substantial economic effect on interstate commerce,' it is manifest that Congress may not regulate conduct that, standing alone, does not directly affect interstate commerce or have a direct effect on a business engaged in interstate commerce.
>
> and
>
> A finding of the requisite nexus herein would be in stark conflict with the principle that our federal government has limited and enumerated

> powers, with routine police power generally being reserved to the states. Such a facile construction of the Hobbs Act as suggested by the government would ignore the tenet that, 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.' There is no such intent in either the express language or legislative history of the Hobbs Act. To the contrary, it is clear that the Hobbs Act was intended to reach only certain activities that hamper interstate business, reflecting the long-recognized principle that the states are best positioned and equipped to enforce the general criminal laws.

Collins, 40 F.3d at 100-101 (citation omitted).

The *Millet* court ignored these clear principles. The extortion alleged against Lester Millet stood alone; it was not part of an aggregate of similar actions. Nevertheless, the Fifth Circuit expanded the *Collins* holding, which shortly after the *Millet* trial became incorporated into the Fifth Circuit's own Pattern Jury Instructions[4], to allow the impermissible amendment of the charges against Millet.

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[4] *Collins* is part of the Fifth Circuit's pattern jury instructions on Hobbs Acts extortion:

> "Refer to *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994) for a discussion on the interstate commerce requirement as it applies to individual victims rather than business victims." 40 F.3d 95 (5th Cir. 1994).

(Fifth Circuit Pattern Jury Instructions No. 2.69, 1997, at 156) This note is appended to the pattern charge on extortion under a color of official right which is of course the charge in the present case.

Collins clearly set forth the parameters of proof for the jurisdictional requirement:

> Criminal acts directed toward individuals may violate section 1951(a) only if (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce; (2) if the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce; or (3) if the number of individuals victimized or the sum at stake is so large that there will be some 'cumulative effect on interstate commerce.' 'However, as broadly as the extension of the interstate commerce requirement has spread, we are still a federal, not a unitary government' and, 'neither the constitutional limits on the power of the national government, nor the jurisdictional requirement of some connection with interstate commerce may be ignored.'

Id. at 100 (citations omitted).

Simply put, the Fifth Circuit's *Millet* opinion will allow prosecutions under the Hobbs Act that are in "stark conflict with the principal that our federal government has limited and enumerated powers, with routine police power generally being reserved to the states." *Id.* at 101. Certiorari is warranted.

II. The Fifth Circuit's Opinion Permits Conviction Under The Hobbs Act on an Uncharged Effect on Interstate Commerce Against an Entity Not Charged as the Extortion Victim, in Violation of the Constitutional Guarantees of the Fifth and Sixth Amendments.

The Fifth Circuit's *Millet* opinion permits conviction under the Hobbs Act for activity never charged in the

indictment, in violation of the Fifth and Sixth Amendments to the United States Constitution. Prior to *Millet*, the Fifth Circuit had determined that a direct effect on interstate commerce occurred when the extortion victim was engaged in interstate travel or interstate commerce. *Collins*, 40 F.3d at 99. Durel Matherne was the victim named by the government in the indictment. There was neither allegation nor evidence that Millet had extorted Formosa, yet the Fifth Circuit asserted that Formosa was directly affected. Incredibly, the Circuit's opinion appears to find "direct effects" on interstate commerce lurking in a rumor that some impropriety had occurred in 1990 between Millet and Matherne. No high-ranking Formosa official testified that such had occurred. Instead, in its opinion the Fifth Circuit relied upon a New Orleans *Times Picayune* article discussing the Highway 51 land transaction as being evidence that the rumored wrongdoing caused Formosa to change its mind and not build the rayon plant in St. John the Baptist Parish. *Millet*, 123 F.3d at 271; App. 5. This newspaper article was **not even admitted into evidence**. Moreover, the newspaper article was published in January 1991. Formosa did not decide to cancel its plans for the plant until October 1992 – some ten months after Millet was no longer in public office and over two years after the purchase of the Whitney Plantation by Formosa. Millet was not indicted until June 2, 1995, nearly three years after the announcement of the plant cancellation. The trial record is replete with evidence of various zoning and permitting problems that

hindered Formosa's attempt to build the rayon plant. Yet the Fifth Circuit determined Millet's rumored wrongdoing involving Matherne constituted direct evidence that Millet's act "was a cause of Formosa's abandonment of its plans." *Id.*

In reaching this conclusion, the Fifth Circuit reasoned that the indictment read in its entirety constituted a general indictment rather than a specific one. Thus, allowing evidence of effect on Formosa's subjective decision regarding location of the rayon plant did not modify an essential element of the interstate commerce requirement. *Millet*, 123 F.3d at 274, App. 12. The indictment itself, however, belies the Fifth Circuit's logic. The indictment is *specific* as to the charge of extortion against Millet: the charged extortion was directed toward Durel Matherne, an individual, *not* toward Formosa, the multi-national corporation, and was related to a single real estate commission, not toward Formosa's decision to build or not to build a rayon plant in St. John the Baptist Parish.

The Fifth Circuit's reasoning essentially ignored the obvious: Lester Millet was not charged with extorting Formosa. He never was called upon to defend himself against such a charge because no such charge was ever made. The charge against him was set forth in the indictment – extortion of the individual Durel Matherne as a result of dealings relating to the sale of the Whitney Plantation by the Barnes family to Formosa. The extortion related to the Whitney Plantation commission earned by Matherne and the subsequent purchase by Matherne's wife of land (the "Highway 51" property) owned by Millet. The only conceivable connection of Formosa to the charged extortion is that (1) Formosa bought property (2)

which purchase resulted in a typical real estate commission (3) that was paid by the Barnes family, as sellers of the property, (4) to Durel Matherne, (5) a portion of which was used by Matherne's wife (6) to purchase an interest in property (7) from Millet (8) that Millet was developing as a subdivision. Clearly, the "House That Jack Built" bootstrap method of demonstrating an effect on interstate commerce continues in the Fifth Circuit, despite this Court's having prohibited such a method in *Stirone*.

The Sixth Amendment guarantees Millet the right to know what crime he is alleged to have committed. The Fifth Amendment guarantees Millet the right not to be charged with a crime except pursuant to a Grand Jury indictment and, if so charged, to due process in the subsequent legal proceedings brought against him. The inclusion of Formosa as a victim of Millet's extortion in the jury charge – when the indictment named only Matherne as the victim – impermissibly amended the indictment. *See, e.g., United States v. Beard*, 436 F.2d 1084 (5th Cir. (Tex.) 1971) (indictment implicitly amended by prosecution's change in position during trial). By allowing the *Millet* jury to reach a guilty verdict on all *or any one* of the four bases presented (the three *Collins* factors plus the erroneous effect on Formosa), the courts below violated Millet's constitutional rights.

The Fifth and Sixth Amendments, as well as the constitutional considerations alluded to in *Collins*, warrant the conclusion that the Fifth Circuit has now so broadened the application of the Hobbs Act that what was an alleged extortion concerning a single real estate commission and the purchase of five acres of land on

Highway 51 in a small rural Louisiana parish became the subject of a federal prosection. It is submitted that the Fifth Circuit's interpretation of the "effect-on-interstate-commerce" aspect of the Hobbs Act involves a question of exceptional importance in federal statutory interpretation because the aspect has been decided in a way that conflicts both with the Act itself and with relevant decisions of this Court. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted:

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

Nos. 96-30968 & 96-30999

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LESTER J. MILLET, JR.

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

(Filed Sep. 15, 1997)

Before DUHÉ and BARKSDALE, Circuit Judges, and COBB,[1] District Judge. HOWELL COBB, District Judge:

A jury in the federal district court for the Eastern District of Louisiana convicted the defendant for violations of 18 U.S.C. §§ 2, 1951, 1952, and 1956, resulting from the misuse of his official position as Parish President of the St. John the Baptist Parish, Louisiana. Millet challenges his convictions on a variety of theories. Finding no merit in any of these theories, we affirm.

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[1] District Judge of the Eastern District of Texas, sitting by designation.

I.

BACKGROUND

Between January, 1988 and October, 1992, Defendant-Appellant Lester Millet, the duly elected President of St. John the Baptist Parish, Louisiana, extracted, under color of official right, a portion of the commission earned by Durel Matherne from the sale of the Whitney Plantation (Whitney) to the Formosa Chemical Corporation (Formosa). Formosa, a Taiwanese Corporation, acquired the Whitney Plantation for the purpose of building a rayon pulp industrial facility in St. John the Baptist Parish, Louisiana.

In 1988, Formosa, in search of a location for a new rayon pulp facility, narrowed its choices to Texas and Louisiana. Formosa considered Louisiana to have advantages over Texas because two suitable sites for the proposed facility were identified and readily available, and Louisiana had superior access to both raw materials and deep-water shipping lanes on the Mississippi River. The two Louisiana sites were both located on the west bank of the Mississippi River in St. John the Baptist Parish. The first site (Willowbend) was owned by the Shell Oil Corporation. It appeared to be the most suitable of the two because it was already zoned for heavy industry, an environmental impact statement (EIS)[2] was nearly complete, and the river abutting the property's batture was deep enough for ocean going vessels. The second site

---

[2] At the time, the United States Environmental Protection Agency (EPA) required an EIS before constructing a new chemical manufacturing facility in this area.

(Whitney), owned by the Barnes family, was large enough for the facility but it was zoned for agriculture, no EIS was underway, and the river abutting the property was not deep enough to support ocean going vessels.

In late 1988, after Formosa rejected the Willowbend site as too expensive, Millet engaged his friend Durel Matherne, a licenced real estate broker who was not actively engaged in a commercial real estate business, in a scheme in which Millet would arrange for Matherne to become the exclusive broker for the sale of the Whitney. In exchange for Millet's influence as President of St. John the Baptist Parish to secure his contract to broker the property, Matherne was expected to share with Millet the sizeable ($479,000) commission he earned from the sale of the Whitney.

Millet, identifying himself as a high ranking public official, then met with Walter Barnes and informed him that the Whitney Plantation could be sold to Formosa for the rayon pulp facility and insisted that Matherne be the broker for the sale. Barnes agreed to the arrangement. Millet then promised Formosa that if it purchased the Whitney Plantation for the rayon facility, he would use his authority to push through the needed rezoning and would ensure Formosa obtained the necessary deep water access for the facility. Millet planned to do this by "convincing", through threats of expropriation if necessary, owners of property adjacent to the Whitney (Wallace tracts) to convey their property to Formosa. He also promised Formosa to assist in obtaining the necessary EPA permits.

In May, 1989, Formosa and the Barnes family signed a contract for the sale of the Whitney. Formosa's purchase was conditioned on being able to obtain the Wallace tracts and necessary rezoning.

Apparently aware of the Whitney's shortcomings and the conditional nature of the contract, Shell contacted Virginia Simons, the development manager for the Port of South Louisiana, to reconvene negotiations between Shell and Formosa for the sale of the Willowbend site. Simons arranged a meeting in which she, a Shell representative, and Millet discussed Shell's interest. In that meeting, Millet verbally abused both of them for "messing with his deal". Shortly afterwards, Millet tried to use his official position as Parish President to have Simons fired and later arranged to withhold $1,000,000 in funds from the port.

In April, 1990, the sale of the Whitney to Formosa was completed and Millet immediately demanded a $200,000 share of the $479,000 commission from Matherne. To effect this transfer, Millet bought an undeveloped piece of real estate (Highway 51 Property) for $200,000 and, against the advice of Matherne's attorney and within two weeks conveyed one-half of it to Matherne for $200,000.

In September, 1990, Matherne submitted a proposal for a contract to provide wood chips to the proposed Formosa facility. On learning of Matherne's proposal, Millet made it clear to Matherne that, even though he (Millet) had no capital to invest in the wood chip venture, he would participate with Matherne on a 50-50 basis. Millet intended to contribute by using his official position

to secure the lucrative contract for himself and Matherne. Millet further made it clear that if he was not allowed to participate, he would use his position to spoil the deal for Matherne.

In January, 1991, Millet, Alden Andre,[3] and Lionel Bailey[4] traveled from Baton Rouge to Dallas to meet with the EPA concerning permits for the proposed rayon plant. Upon returning from Dallas, Millet offered to give Bailey a convenience store which would be located near the rayon facility in exchange for Bailey's assistance in securing the wood chip contract. Bailey reported this offer to Andre shortly after it was made.

Just prior to the Dallas trip, The New Orleans Times Picayune reported the Highway 51 land transaction in an investigative article. This disclosure embarrassed Formosa officials in the United States and Taiwan. In October, 1992, Formosa abandoned its plans to construct the rayon pulp facility in part because of mounting public opposition and in part because of the activities of Lester Millet.

Pursuant to a three count indictment, Millet was charged with: Count 1, violating 18 U.S.C. §§ 2, 1951, (Hobbs Act); Count 2, violating 18 U.S.C. §§ 2, 1956 (Money Laundering); and Count 3, violating 18 U.S.C. § 1952 (Travel Act). In accord with the provisions of 18 U.S.C. § 982, the government also sought a forfeiture of the $200,000 Millet received from Matherne. The jury convicted Millet of all three counts. He was subsequently

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[3] Formosa's vice president.

[4] Formosa's environmental manager.

sentenced to fifty-seven (57) months imprisonment, fined $200,000, and ordered to forfeit $200,000.

On timely appeal, Millet raises nine issues in urging this Court to reverse his convictions.[5] Even though

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[5] On appeal Millet raises the following issues:

1) Over objection, the trial court charged, and the government argued at trial that the jury could convict on Count 1, a violation of 18 U.S.C. § 1951 ("Hobbs Act") on evidence of the effects on interstate commerce other than relates to the specified victim;

2) The jury was allowed to convict on a theory of extortion of victims other than the charges in the indictment;

3) The only act by Millet related to the charged extortion was a telephone call to a private individual over whom the official had no power and upon whom he exercised no official power before Millet's first contact with the alleged victim;

4) The only thing received by Millet from the alleged victim was the purchase price of property on a "value for value" basis to which Millet was entitled;

5) The proof at trial does not show a promise from Millet to perform an official act in exchange for a benefit from the alleged victim. The official act occurred before Millet had contact with the victim;

6) Count 2 of the indictment which charges a violation of 18 U.S.C. § 1956 ("Money Laundering") states as its predicate offense the Hobbs Act violation and since the Hobbs Act conviction cannot stand, the money laundering conviction cannot stand;

7) A scheme to "personally benefit" from the Formosa plant is not unlawful under the Hobbs Act;

8) Count 3 which charges a violation of 18 U.S.C. § 1952 ("Travel Act") cannot be sustained because it is predicated on an "official act" Hobbs Act violation

Millet's enumerates nine issues, in essence he challenges his Hobbs Act conviction on grounds of constructive amendment and insufficiency of the evidence;[6] his money laundering conviction on grounds that the Hobbs Act conviction is invalid;[7] and his Travel Act conviction on grounds that the Hobbs Act conviction cannot be the "unlawful activity", the indictment was insufficient and the court improperly charged the jury.[8]

II.

THE HOBBS ACT

The Hobbs Act penalizes: (1) "[w]hoever in any way or degree obstructs, delays, or affects commerce or any article in commerce, (2) by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do any thing in violation of this section[.]" 18 U.S.C. § 1951(a) (West 1997). Millet

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which is deficient in its proof of "effect on interstate activity";

9) The adoption of the Hobbs Act charge as the unlawful activity for the Travel Act charge is prejudicial error because the Hobbs Act crime terminated before the necessary travel for the Travel Act.

[6] Issues 1, 2, 3, 4 and 5 relate to Millet's conviction under the Hobbs Act.

[7] Issue 6 relates to Millet's conviction on money laundering.

[8] Issues 7, 8, and 9 relate to Millet's conviction under Travel Act.

argues that his conviction under the Hobbs Act must be reversed because the district court constructively amended the indictment and the evidence presented at trial was insufficient to convict.

(a) Constructive Amendment

A constructive amendment to the indictment occurs when the jury is permitted to convict the defendant on a factual basis that effectively modifies an essential element of the offense charged in the indictment. *United States v. Young*, 730 F.2d 221, 223 (5th Cir. 1984); *United States v. Holley*, 23 F.3d 902, 912 (5th Cir. 1994) (citations omitted). However, all factual variations do not rise to the level of a constructive amendment. This Court must distinguish between a constructive amendment to the indictment and mere variations between the indictment and proof.

An indictment can be constructively amended either by evidence offered at trial or by jury instruction. *Stirone v. United States*, 361 U.S. 212 (1960). The constructive amendment can be either explicit or implicit. *United States v. Doucet*, 944 F.2d 169, 172 (5th Cir. 1993). Millet argues both apply here. He contends his indictment was constructively amended when the district court permitted the government to offer proof concerning the direct effect his act had on Formosa's interstate commerce activities, and when the district court included a theory within the Hobbs Act jury charge which allowed the jury to find a Hobbs Act violation if it found that Millet's actions directly and adversely affected Formosa.

In the absence of a timely objection at trial, this court subjects a post-conviction claim of constructive amendment to plain error analysis. *United States v. Olano*, 507 U.S. 725, 731-34 (1993); *United States v. Reyes*, 102 F.3d 1361, 1364 (5th Cir. 1996). Mere factual variations between the indictment and proof at trial are examined under the harmless error doctrine. *Young*, 730 F.2d at 223. At trial, Millet failed to object to the evidence concerning the effect his acts had on Formosa's commerce activities and, although he raised a general objection to the Hobbs Act jury charge, it was insufficient to preserve a constructive amendment error. Accordingly, we first look to see if there was a constructive amendment to the indictment and if there was, we analyze for plain error.

For this Court to find a constructive amendment to the indictment, we review the record to determine if evidence offered at trial or the district court's jury charge permitted the jury to convict Millet on a factual basis which effectively modified one of the two essential elements charged of the Hobbs Act indictment. *Id.* As it applies to this case, the two essential elements of the Hobbs Act are extortion and commerce. Commerce means, "[A]ll commerce between any point in a state . . . and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction." 18 U.S.C. § 1951(b)(3) (West 1997). The term extortion means, "the obtaining of property from another with his consent . . . under the color of official right". 18 U.S.C. § 1951(b)(2) (West 1997).

Millet bases his constructive amendment argument on Paragraph 18 of Count 1 which states:

> From on or about January 11, 1988, and continuing until or about January 13, 1992 in the Eastern District of Louisiana and elsewhere, LESTER J. MILLET, JR., while serving as Parish President for St. John the Baptist Parish, Louisiana did knowingly, willfully and unlawfully, affect and attempt to affect interstate commerce by means of extortion, in that the defendant did unlawfully obtain approximately $200,000 not due him or his office from Durel Matherne, with Durel Matherne's consent, under color of official right, that is, for or because of official act by LESTER J. MILLET, JR., related to the sale of the Whitney Plantation.

In urging this court find a constructive amendment, Millet argues the district court was bound to narrowly construe this charging paragraph as a "specific act against an individual" and as such, the government was limited to proving the extortion element, and proving the effect on interstate commerce by only offering evidence that: 1) his act depleted the assets of Matherne, an individual customarily engaged in interstate commerce; 2) his act caused the completion of, or created the likelihood that the assets of an entity engaged in interstate or foreign commerce would be depleted; or 3) the number of individuals affected was so great or the sum extorted was so large that there was some cumulative effect on interstate commerce. *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994). In short, Millet insists that, as in *Collins* and *Stirone* his indictment was constructively amended when the district court accepted evidence that his actions directly affected Formosa's interstate activities, this evidence impermissibly modified the essential commerce element,

and that the jury was allowed to convict on that basis. *Id.* We disagree.

We distinguish *Stirone* and *Collins* on the facts. In *Stirone*, the defendant's Hobbs Act conviction was reversed when the Court found his indictment was constructively amended by the district court's admission of evidence and its jury charge that permitted the jury to convict Stirone upon a showing that his acts affected the movement of steel in interstate commerce. *Stirone*, 361 U.S. at 214. The Court reasoned that because Stirone's indictment charged only that the defendant's extortionate act affected the movement of sand (an important building material) in interstate commerce, it was uncertain whether Stirone was convicted of impeding commerce in sand, as charged or steel which was uncharged. *Id.* at 219. Unlike the *Stirone* indictment, we read Paragraph 18 of Count 1 of the indictment as drawn in general terms that tracks the statutory language of 18 U.S.C. § 1951(a). There is no limitation imposed on proving the effect on interstate commerce.

Likewise, *Collins* is distinguished in that the Hobbs Act charge stemmed from the defendant's robbery of the personal property of a salesman. *Collins*, 40 F.3d at 99-100. No extortion was involved. Furthermore this Court found that the nexus between the robbery victim and interstate commerce was at best indirect and extremely attenuated and more than likely, there was none. *Id.* Here, Millet's extortionate act was integral to a land transaction of a multi-national corporation and was a cause of Formosa's abandonment of its plans. *Collins* simply does not control this case.

Millet's argument that Paragraph 18 of Count 1 is a specific charge against an individual has merit only if the last clause were taken entirely out of context or if it stood alone as Count 1. We decline to read the last clause out of context and we also decline to ignore the preceding seventeen (17) paragraphs in Count 1 of Millet's indictment.

When an indictment under the Hobbs Act is drawn in general terms, a conviction may rest on a showing that commerce of one kind or another has been burdened. *Stirone*, 361 U.S. at 218. It follows that when the indictment is drawn generally, the government may offer proof that the act either directly or indirectly affected interstate commerce. *Id.* We see the only limitation imposed by Count 1 of the indictment was that the government was limited to proving extortion under color of official right as opposed to robbery, threats, or the use of physical violence. Our examination of the record indicates no such proof of the latter three was offered.

We find the district court did not err in admitting proof that Millet's extortionate act directly affected the interstate activities of Formosa. Count 1, including Paragraph 18, when read in its entirety indicates a general indictment under the Hobbs Act and as such, the district court's admission of proof that Millet's act directly affected Formosa did not modify the essential element of interstate commerce as defined by 18 U.S.C. § 1951(b)(2) (West 1997).

Millet also urges a constructive amendment of his indictment because the court supplemented the *Collins* factors *supra* in its jury charge with, "Under this theory

the defendant may have interfered with or affected interstate commerce in one or all of the following ways: . . . 4) adversely affecting the interstate and international commerce activities of Formosa Plastics Corporation . . . . ".[9] However, the *Collins* factors apply only if a criminal act was directed to an individual and therefore, the district court was warranted in supplementing the *Collins* factors. *Collins*, 40 F.3d at 100. Accordingly, this Court looks to whether the district court's jury charge as a whole is a correct statement of the law. *United States v. Stacey*, 896 F.2d 75, 77 (5th Cir. 1990). We find that the district court's Hobbs Act jury charge in which it gave the *Collins* factors along with its supplemental factor was a correct statement of law and did not constructively amend the indictment. Moreover, we think the charge was helpful to the jury in that it illustrated the possible ways that Millet's extortionate act may have affected interstate commerce.

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[4] [sic] The Court's charge to the jury on Count 1 included the following:

> Under this theory the defendant may have interfered with or affected commerce in any one or all of the following ways: 1) depleting the assets of an individual customarily and directly engaged in interstate commerce; 2) causing or creating the likelihood that Durel Matherne would deplete the assets of a business or businesses engaged in interstate commerce; 3) extorting such a large amount that it had a cumulative effect on interstate commerce; or 4) adversely affecting the interstate and international commerce activities of the Formosa Plastics Corporation, a company headquartered in Taipai, Taiwan, Republic of China.

In summary, we find there was no constructive amendment to Count 1 of the indictment and therefore, we need not undertake plain error analysis.

(b) Sufficiency of the Evidence

In determining whether there was sufficient evidence to support a conviction, this Court must determine, in a light most favorable to the verdict whether a rational trier of the facts could have found that the evidence established guilt beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979); *United States v. Carrasco,* 830 F.2d 41, 43-44 (5th Cir. 1987). Millet advances three separate theories as to why there was insufficient evidence to support his conviction. We disagree with all of them.

Millet first contends there could have been no extortion because his only act related to the charged extortion was to place a telephone call to a private individual over whom the official had no power and upon whom he exercised no official power before Millet's first contact with the alleged victim. This is nonsense.

To prove extortion the government must show that Millet took money or something of value not due him or his office for the performance or non-performance of an official function. *See McCormick v. United States,* 500 U.S. 257 (1991). The official need not control the function in question if the extorted party reasonably believes in the official's powers. *United States v. Rabbitt,* 583 F.2d 1014 (8th Cir. 1978). Millet claims that because this was a private deal between private parties, there can be no "color of official right". The record is replete with evidence that Durel Matherne, who was not a practicing real

estate agent, could not have become the exclusive broker for the sale of the Whitney Plantation without the approval of Millet who was acting in his capacity as the St. John the Baptist Parish President. The record also contains substantial evidence that in exchange for arranging Matherne's employment as the exclusive broker for the Whitney's sale, Millet demanded and received a portion of the Whitney sales commission. Specifically, Walter Barnes, one of the Whitney's owners, testified he had not heard of Matherne before Millet introduced them, and the only reason Millet was able to secure Matherne's employment as broker for the Whitney was because of his official position as St. John the Baptist Parish President. We find there was sufficient evidence for a rational jury to conclude that all parties involved believed they must accede to Millet's demands to accomplish the sale of the Whitney to Formosa.

Millet next argues he did not explicitly promise to perform an official act in exchange for a benefit from the alleged victim. He further asserts that he committed no official act and therefore, cannot be convicted under the Hobbs Act. As authority, Millet cites *Evans v. United States*, 504 U.S. 255 (1992). Millet misreads *Evans*. *Evans* stands for the proposition that an explicit demand for payment for the official act is not required to convict under the Hobbs Act and further, that an affirmative step is not an element under the statute. *Id.* at 268. Millet used the apparent authority of his official position to secure the real estate listing for Matherne. Furthermore, the government proved at trial that Millet used his official capacity to satisfy the conditions imposed by the contract

for the sale of the Whitney to ensure the sale was ultimately consummated. We find the government's theory that the payment Millet extracted from Matherne was in exchange for not just the listing but, for all of his official acts is credible, and that it satisfies the *quid pro quo* requirement of the Hobbs Act.

Finally, Millet argues the only thing he received from the alleged victim was the purchase price of the Highway 51 property on a "value for value" basis to which he was entitled. Millet's argument refers to his conveyance of half of the Highway 51 property to Matherne's wife in exchange for approximately one-half of Matherne's commission from the sale of the Whitney. He contends that if the Highway 51 property were developed, subdivided and later sold as individual lots, Matherne would more than recover the $200,000 he transferred to Millet for the property. The implication is that this transaction was an arms-length contract for the sale of real estate. We find this argument entirely without merit.

In Louisiana, it is well settled that the value of an immovable property be evaluated according to the state in which it was at the time of the sale. *See* LA. CIV. CODE. ANN. art. 2590 (West 1997) (emphasis added). The "market value" of a property means "the fair value of the property between one who wants to buy and one who wants to sell under the usual circumstances." *Henderson v. Dyer*, 68 So.2d 623, 625 (La. Ct. App. 1st Cir. 1953) (citations omitted). At trial, the jury was presented with substantial evidence: that the portion of the Highway 51 property did not have a fair market value of $200,000 at the time it was conveyed to Matherne; that the property

was not sold under the usual circumstances; and that Matherne did not want to buy the property.

The government presented credible evidence that Millet and Matherne sought a means of conveying to Millet the $200,000 which represented Millet's share of the Whitney commission. Among the schemes considered were: a direct payment from Matherne to Millet; an office lease under which Matherne would pay a grossly inflated rental; and paying Millet's son a grossly inflated draw as a new "partner" in Matherne's insurance business. Matherne's attorney advised that all these sham transactions were thinly disguised kickbacks which would constitute an illegal payment to a public official. Despite that warning, to effect the $200,000 kickback Millet bought the Highway 51 property for $200,000 and almost immediately demanded Matherne accept one-half of that property in exchange for $200,000.

At trial, the government presented substantial evidence that, at the time Millet conveyed half of the Highway 51 property to Matherne, the entire undeveloped Highway 51 property was worth at most, $200,000. The government also offered credible evidence that when Millet divided the property into halves and conveyed one-half to Matherne, the half he conveyed to Matherne had a value of less than one-half of the original $200,000 purchase price. Yet, Matherne paid $200,000 for his parcel. All of this occurred less than two weeks from the time Millet originally bought the property. Given the evidence, the timing and the fact that Millet presented no credible evidence to support his position that the value of the parcel conveyed to Matherne was worth anywhere near $200,000, we find that a rational jury could find beyond a

reasonable doubt this transaction was a sham designed to kick-back part of Matherne's Whitney commission to Millet.

Matherne did not want to purchase the undeveloped Highway 51 property from Millet but did so only because of pressure applied by Millet for a share of the Whitney commission. Matherne was not in the business of real estate speculation or real estate development and would ordinarily have no interest in an undeveloped parcel of property; particularly one for which he would have to pay at least twice the market value. Evidence in the record also indicates that at the time of the Highway 51 transaction, Matherne had financial and (income) tax difficulties to which he would likely have applied the $200,000 Millet demanded for the property. Matherne's testified that at best, he expected to break even if he could develop and sell the property. All this is evidence that given a free choice, Matherne had no desire to purchase the Highway 51 property.

Though Matherne was not a practicing real estate agent, he held a valid real estate licence and was hardly a novice when it came to valuing the undeveloped Highway 51 property. Matherne testified that he knew the value of the Highway 51 property was less than one-half of what he was paying. Given disparities in value, the parties' knowledge thereof, their relative positions, and the fact that there was no evidence presented that Millet and Matherne conducted any sort of price negotiation (a strong indicator of an arms-length transaction) a rational jury would conclude these were not the usual circumstances under which a real estate transaction occurs.

We find sufficient evidence was presented at trial that a reasonable jury would characterize the Highway 51 land transaction as a sham or kickback scheme designed to convey a $200,000 share of the Whitney Plantation commission from Durel Matherne to Lester Millet. We further find that all elements of 18 U.S.C. § 1951 were proven beyond a reasonable doubt and accordingly we AFFIRM Lester Millet's Hobbs Act conviction.

III.

MONEY LAUNDERING

Millet's sole basis for urging this Court to reverse his conviction under 18 U.S.C. § 1956 (money laundering) is that his conviction under the Hobbs Act must be reversed and therefore, there was no unlawful activity to support the money laundering conviction. The pertinent section of the money laundering statute, states:

> (a)(1) Whoever knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> (B) knowing that the transaction is designed in whole or in part – (I) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of a specified unlawful activity;[.]

18 U.S.C. § 1956(a)(1)(B)(I) (West 1997).

Because we affirm Millet's conviction under the Hobbs Act, the Hobbs Act serves as the unlawful activity,

and we find that the Highway 51 real estate conveyance fits the definition of a financial transaction designed to conceal the source of the proceeds, we AFFIRM Millet's conviction under 18 U.S.C. § 1956.

IV.

THE TRAVEL ACT

To obtain a conviction under 18 U.S.C. § 1952 (Travel Act), as it applies to the instant case, the government had to prove the following elements beyond a reasonable doubt: 1) travel in interstate or foreign commerce; 2) with the intent to; 3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity; and 4) thereafter performs or attempts to perform [an act described in element 3]. 18 U.S.C. § 1952(a)(3)(A) (West 1997). "Unlawful activity" means, extortion, bribery, or arson in violation of the laws of the state in which committed or of the United States. 18 U.S.C. § 1952(b)(i)(2) (West 1997).

Millet attacks his conviction under the Travel Act on three theories: 1) a scheme to "personally benefit" from the Formosa plant is not unlawful under the Hobbs Act and consequentially is not unlawful under the Travel Act; 2) because his Hobbs Act, which serves as the "unlawful activity" must be reversed on insufficient proof of an "effect on interstate activity", his Travel Act conviction too must be reversed; and 3) the adoption of the Hobbs Act charge as the unlawful activity for the Travel Act charge is prejudicial error because the Hobbs Act crime

terminated before the necessary travel for the Travel Act. We find no merit in any of these theories.

Millet first complains that the use of the phrase, "scheme to personally benefit" in Count 3, Paragraph 1 does not state a crime under the Hobbs Act and therefore cannot be the requisite unlawful activity as defined by the Travel Act. This complaint suffers from the same flaw as his Hobbs Act constructive amendment argument; that being Millet extracts a single phrase from context and argues that the phrase standing alone, somehow invalidates the entire count. Even if we find that the phrase he complains of was inartfully drawn, we decline to read it totally out of context. When Paragraph 1 of Count 3 is read in its entirety, it is clear that it refers to a Hobbs Act violation. We also note that Millet's argument here is particularly specious because the record indicates he motioned the district court for an eleven part bill of particulars directed solely to Count 3 of the indictment. Nowhere in that motion did Millet raise this somewhat trivial complaint and though his motion was denied, he received a full hearing at which he conceded the government adequately responded in writing to his query concerning the nature of unlawful activities that formed the basis for the Travel Act indictment. We therefore dismiss this complaint as groundless.

Millet next complains that his Travel Act conviction cannot be sustained because it was predicated on a Hobbs Act "official act" conviction which was deficient in its proof on the effect on interstate commerce. Because, for reasons stated above, we find the jury properly convicted Millet of the charged Hobbs Act violation, we find this argument without merit.

Finally, Millet argues that the adoption of the Hobbs Act charge as the unlawful activity for the Travel Act charge is prejudicial error because the Hobbs Act crime terminated before the necessary travel for the Travel Act occurred. This argument appears to be premised on his notion that for there to be a conviction under the Travel Act, there necessarily must be a conviction of the underlying predicate unlawful activity. This is not the law.

The Travel Act was one of several bills enacted by Congress to aid the states in the battle against organized crime. *Perrin v. United States*, 444 U.S. 37, 41-42 (1979) (citations omitted). Because the definition of the unlawful activity refers to both state as well as federal offenses, it is clear Congress intended for the Travel Act to supplement state authority in battling organized crime problems. *Id.* at 42. It is also well settled that under the principles of federalism, the federal courts may not assume jurisdiction over state offenses. Therefore, it clearly follows that if a state law offense were to serve as the underlying "unlawful activity" for the Travel Act and the law is to supplement state law rather than burden it, there can be no requirement for a conviction of the underlying unlawful activity.[10] *See United States v. Nardello*, 393 U.S. 286, 290-95 (1969) (*discussing* the use of a state law as the underlying unlawful activity); *United States v. Jones*, 642 F.2d 909, 913 (5th Cir. 1981) (defendant convicted of Travel Act violation without underlying conviction of illegal organized gambling). Lastly, a violation of the

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[10] It further follows that if the Travel Act requires no conviction of an underlying state offense, it also follows that there need be no conviction of an underlying federal offense.

Travel Act does not require that a facilitation act in the destination state be an unlawful activity. *Perrin*, 444 U.S. at 49-50.[11]

Accordingly, we find that Count 3 of the indictment properly charges a violation of the Travel Act. It properly identifies the unlawful activities, it identifies the interstate travel and it identifies the act Millet thereafter attempted to perform (promotion).[12]

We do not agree that Millet's Travel Act conviction is necessarily predicated on his Hobbs Act conviction. The record supports and the government proved at trial that Millet engaged in a multi-faceted scheme to extract illegal personal profits wherever practicable, "under color of

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[11] This is not to say that there is no limitation on the reach of Travel Act. The Court in *Rewis v. United States*, limited the reach of the Travel Act by requiring a tangible nexus to interstate commerce and by warning that the act could not be used to turn a relatively minor state offense into a federal felony. *Rewis v. United States*, 401 U.S. 808, 811-12 (1971). We note that when the underlying unlawful activity is an uncharged federal or a state law offense, there are three essential elements which must be proved beyond a reasonable doubt: 1) the defendant traveled in interstate commerce on or about the time and between the places charged in the indictment; 2) the defendant engaged in such travel with the specific intent to promote, manage, establish or carry on an unlawful activity; and 3) the defendant thereafter knowingly and willfully committed an act to promote, manage, establish or carry on such unlawful activity. *United States v. Green*, 882 F.2d 999, 1006 (5th Cir. 1989).

[12] The "promotion" corresponds to the fourth element of the Travel Act. In this case it refers to Millet's attempt to bribe Lionel Bailey in violation of Louisiana's Commercial Bribery Statute. La. Rev. Stat. Ann. § 14.73 (West 1997).

official right" from the siting of Formosa's rayon pulp plant. While the scheme itself is not the underlying unlawful activity, any one of its individual components may serve as the unlawful activity if it meets the statutory definition and the government meets its burden of proving beyond a reasonable doubt that the defendant committed the unlawful activity.

Finally, we look at the court's jury instructions to ensure that the jury was properly charged. In reviewing the propriety of a jury instruction, this court looks at whether the charge as a whole is a correct statement of the law. *Stacey*, 896 F.2d at 77. We find that the district court correctly stated the law in its jury charge on the Travel Act.

Because Count 3 of the indictment properly charged a violation of the Travel Act, sufficient evidence was presented at trial for a rational jury to convict Millet of the charge, and the district court properly instructed the jury, Millet has no substantive complaint. His conviction under 18 U.S.C. § 1952 is hereby AFFIRMED.

V.

CONCLUSION

For reasons stated above, we find no reason to disturb the jury's decision to convict Millet for violations of 18 U.S.C. §§ 2, 1951, 1952 and 1956. We also find no reason to disturb the forfeiture resulting from Millet's unlawful activities. Accordingly, we AFFIRM his conviction on all counts.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 96-30968 & 96-30999

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LESTER J MILLET, JR

Defendant - Appellant

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed Nov. 5, 1997)

(Opinion 9/15/97, 5 Cir., ___, ___ F.3d ___)

Before DUHÉ, and BARKSDALE, Circuit Judges, and COBB*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

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* District Judge of the Eastern District of Texas, sitting by designation.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M Duhé,
JOHN M DUHÉ
United States Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA — CRIMINAL ACTION

vs. LESTER J. MILLET, JR.
367 WEST 5TH STREET
LAPLACE, LA. 70068

95-0187
(CASE NO. SEC.)

435-54-6842
(SOC. SEC. NO.)

JUDGMENT AND
PROBATION/COMMITMENT ORDER

(Filed Sep. 8, 1996)

In the presence of the attorney for the government, the defendant appeared in person on this date (Month 9 Day 6 Year 96).

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

__ WITHOUT COUNSEL

XX WITH COUNSEL JOHN R. MARTZELL, ESQ.
(Name of Counsel)

Court Reporter's Name: RHONDA HARDIN

PLEA: X GUILTY, and the court being satisfied __ NOLO CONTENDERE __ NOT GUILTY that there is a factual basis for the plea.

There being a verdict of: (XX GUILTY. APRIL 24, 1996.

Defendant as [sic] been convicted as charged of the offense(s) of 18§1951; 18§1956; 18§1952 INTERFERENCE WITH COMMERCE BY THREATS, MONEY LAUNDERING AND INTERSTATE TRAVEL IN AID OF A RACKETEERING ENTERPRISES AS CHARGED IN THE SUPERSEDING INDICTMENT.

The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 57 MONTHS as to Counts 1, 2 and 3, to be served concurrently. IT IS FURTHER ORDERED that the defendant shall pay to the United States a fine of $200,000.00 as to Count 1. Said fine includes the cost of confinement pursuant to U.S.S.G. §5E1.2(f) and (i). The payment of the fine of $200,000.00 shall begin while the defendant is incarcerated. Upon release, any unpaid balance shall be paid at a rate of $10,000.00 per month. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 YEARS, as to Counts 1, 2 and 3, all such terms to run concurrently. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released. While on supervised release, the defendant shall not commit another federal, state, or local crime, shall not unlawfully possess a controlled substance, and shall comply with the standard general conditions have been adopted by this court. The defendant shall not possess a firearm. The drug testing condition called for by 18 USC§3583(d) is suspended based on the court's determination that the

defendant poses a low risk of future substance abuse. In addition, the following special conditions are imposed: 1.) That the defendant make complete disclosure of his personal and business finances and submit to an audit of his financial records, as directed by the U. S. Probation Officer. 2.) The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer. 3.) That the defendant shall pay any fine that is imposed by this judgment.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of $50.00 as to Count(s) 1, for a total assessment of $50.00

IT IS FURTHER ORDERED that the defendant notify the United States Attorney for the District within 30 days of any change of residence or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. In addition to the special conditions of probation imposed above, IT IS HEREBY ORDERED that the general conditions of probation/ supervised release set out on the reverse side be imposed.

IT IS FURTHER ORDERED:

[ ] The court has determined that the defendant does not have the ability to pay interest. The interest requirement is (waived) (modified as follows):

SIGNED BY:
xxx U.S. District Judge
___ U.S. Magistrate

/s/ G. Thomas Porteous, Jr.
G. THOMAS PORTEOUS, JR.
(Date) 9/6/96